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ABSTRACT

Questions and issues critical to an understanding of arbitration in higher education are discussed. Aspects of the academic arbitration model are defined. The following four topics are examined: (1) the procedural similarities and differences between academic arbitration and the industrial model; (2) the possible inherent conflict between academic arbitration and a collegial employment relationship based on peer review and shared authority; (3) the scope of arbitrability and the role of academic judgement within the academic arbitration process; and (4) the restraints imposed by the requirements of confidentiality in the peer review process. Arbitration of faculty status issues remains a viable means of dispute resolution on unionized campuses. The deferral accorded the arbitration system and individual arbitrators by the courts and administrative agencies is well established. Opponents of faculty unionization cite academic arbitration as an example wherein collective bargaining is inherently contradictory to peer review and a collegial employment relationship. The effect of arbitral remedy remains unclear, as arbitrators are frequently limited to procedural remands to the very committee that made the decision that gave rise to the grievance. Academic arbitration remains a conservative process with both faculty unionists and college administrators relying on the procedural models developed in the industrial sector more than 50 years ago. Contains 26 references. (SM)

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ARBITRATION IN ACADEME

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NEWSLETTER

NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION AND THE PROFESSIONS

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Arbitration in Academe

The unionization of college faculty remains an expanding phenomenon. As of January 1, 1989, approximately 227,000 faculty accounting for one-third of the professoriate, were represented by certified bargaining units in public and private, two- and four-year institutions. Over 453 collective bargaining agreements covering 1,027 campuses were in effect.[1] Enabling legislation exists in 27 states under which public sector faculty bargain. An additional three states permit negotiations subject to local governing board authorization. Public sector faculty also negotiate in the absence of legislation. At approximately 70 private institutions faculty collectively bargain under the protection of the National Labor Relations Act.[2]

The vast majority of faculty collective bargaining agreements contain grievance procedures culminating in arbitration as a means of resolving disputes.[3] Grievance arbitration is also found on nonunionized campuses and is utilized in those schools as a mechanism for institutionalizing processes to ventilate alleged unfair employment practices or as a means of preventing unionization. While the number of institutions with these grievance procedures culminating in arbitration is limited, it is expected that this figure will increase.[4]

The widespread use of binding arbitration on unionized campuses suggests that decision-making responsibility, once thought to lie within the exclusive domain of the academy of self-governing scholars, is now being shared with third-party neutrals, thus altering long-standing college governance procedures.[5] The issues at grievance are often critical to one's professional life, involve career decisions, (that is reappointment and tenure) and are agressively pursued. In making these decisions, administrators and faculty must now be cognizant of contractual requirements, as numerous aspects of governance and peer review are being codified into the labor agreement.

In the more than two decades that collective bargaining in higher education (CBHE) has been in place, a body of case law, practice, customs, and rules has developed similar to that found in most other unionized employment relationships. Although there are distinctions between academe and industrial arbitration, these differences are minimal. The dissimilarities are primarily found in contractual limitations placed on the scope of review and arbitrability.

Questions and issues critical to an understanding of arbitration in higher education are listed below:

1) What are the procedural similarities and differences between academic arbitration and the industrial model?

2) Is there an inherent conflict between academic arbitration and a collegial employment relationship based on peer review and shared authority?

3) What is the scope of arbitrability and the role of "academic judgment" within the academic arbitration process?

4) What are the restraints imposed by the requirements of confidentiality in the peer review process?

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The purpose of this study is to identify various aspects of the academic arbitration model for practitioners and those who might be called upon to serve as neutrals in higher education disputes. This paper is limited to the arbitration of faculty rights and, while there are a growing number of arbitration cases relating to non-faculty and support staff personnel, that area is beyond the scope of this project. The data for this study were gathered from the contract file of the National Center.

I. PROCEDURAL SIMILARITIES AND DIFFERENCES BETWEEN ACADEMIC AND INDUSTRIAL ARBITRATION

The uniqueness of CBHE, at least with respect to the grievance and arbitration process, is not supportable. Procedural and structural components inherent in academic arbitration are similar to those found in most industrial contracts. In a study conducted by the NCSCBHEP of 129 arbitration clauses in faculty contracts, it was found that over 90 percent contained grievance procedures with 74 percent of these culminating in binding arbitration.

The American Arbitration Association (AAA) was named as the administrative tribunal in more faculty collective bargaining agreements than any other agency. Nearly one-third of all contracts (31 percent) named the AAA, 7 percent public employment relations boards (PERBs), and 4 percent indicated the Federal Mediation and Conciliation Service (FMCS). Nearly 25 percent of the agreements provided a choice of agency alternatives citing AAA, PERB and FMCS. However, thirteen percent did not specify any agency requiring mutual consent as the primary criteria in the selection process. Only four percent of the contracts surveyed designated permanent panels of arbitrators. While six percent of the contracts utilized procedures other than the ones cited above, 9 percent were silent.

Only two contracts required that the arbitrator have prior experience in arbitrating higher education issues. This is consistent with the industrial model wherein the arbitrator need not possess expertise in the subject matter in order to be selected to hear cases in an industry. Many experienced arbitrators are rostered by the AAA, FMCS, PERBs, and other agencies and the same names are likely to appear on arbitration panels and lists no matter which tribunal is designated. The vast majority of higher education cases are heard by single, ad hoc arbitrators selected to hear grievances on a case-by-case basis with selection procedures similar to those found in the industrial model.

Several higher education faculty contracts contain expedited grievance procedures similar to those in the United States Postal Service, Veterans Administration and various civil service commissions. Conditions cited for the use of the accelerated process include summary discharge, class action claims, and grievances arising from an authority higher than the immediate supervisor.

II. CONFLICT BETWEEN ARBITRATION AND A COLLEGIAL EMPLOYMENT RELATIONSHIP

In perhaps no other employment relationship does the question of shared authority between faculty, administration, and board of trustees cloud the issue of managerial authority. In the industrial sector, the managerial and supervisory delineation is clear. According to one commentator, this issue "...highlights clearly the most distinct aspect of higher education bargaining...this shared system of college and university governance has no known counterpart and presents unique problems to collective bargaining..."[6]

Furthermore, assuming for the purposes of discussion that faculty are employees whose rights to bargain are statutorily protected and not subject to the managerial or supervisory designation delineated by the United States Supreme Court in NLRB v. Yeshiva University,[7] there arises the question of against whom is the grievant grieving? Is the grievance against fellow members of the faculty, or against management or supervisory administrators outside the bargaining unit? Since the majority of faculty grievances involve appointment, retention, promotion, and tenure (ARPT), it would appear that faculty members are grieving the actions of their peers. If faculty members are denied reappointment by members of their own departmental promotion and tenure committee (PTC) (assuming that the substantive aspects of that decision are arbitrable), the arbitrator may be required to rule on the conflicting rights of unit members. This issue often goes beyond shared authority and collegiality, and places faculty against their peers in an adversarial review process.

In the case of nontenured faculty, similar issues are encountered. Since bargaining unit membership is not seniority based, cases of non-reappointment often involve the collective judgment of senior faculty with respect to junior members. Unlike the industrial sector where employment probation might involve six months to one year, academic probation can be as long as five to seven years, thereby greatly increasing the frequency of grievance claims by junior faculty.

Another potential area of conflict between academic arbitration and a collegial employment relationship is the widespread reliance and acceptability of the American Association of University Professors (AAUP) Policy Statements and whether or not these documents can be juxtaposed on labor agreements without eroding their substance. The 1940 AAUP Statement of Principles codifies standards of academic freedom, while the 1958 AAUP Statement of Procedural Standards in Faculty Dismissal Proceedings sets forth procedural standards to be applied in faculty dismissal proceedings.[8] While the application of the 1958 Statement varies, the format is akin to advisory arbitration since ad hoc faculty hearing officers conduct due process hearings and make recommendations in the disposition of the

claim. These recommendations are rarely, if ever, binding. The import of the process often transcends the individual claim as its impact on academic issues related to the employment relationship must be considered. The 1973 AAUP report on the Arbitration of Faculty Grievances and the 1983 Statement of Arbitration in Cases of Dismissal support the use of arbitration to resolve faculty status disputes.

The AAUP model of arbitration departs from the academic arbitration process negotiated in collective bargaining agreements in several areas. These modifications are not contained in any one document but have been compiled by the author from the four AAUP documents cited above. They include, but are not limited to, the following:

1. Faculty participation in the form of a "mediative effort" prior to the arbitration stage should be encouraged.

2. The "mediative effort" should be continued by faculty selected to serve on the arbitration panel designated to hear the formal charges.

3. Individuals selected as arbitrators should be "...knowledgeable in the ways of the academic world, aware of the institutional implications of their decisions and, ..., sensitive to the meaning and critical value of academic freedom; ..."[9]

4. The individual grievant, rather than the bargaining agent, should control access to arbitration.

5. The arbitration process should not be limited to unionized schools.

6. The arbitrator should have full access to the "...substance of the record developed in the hearings before the faculty committee..."[10]

The AAUP Statements raise several critical issues. The first two points emphasize a conciliatory approach consistent with the development of a nonadversial process. The selection of neutrals who have prior experience in arbitrating higher education disputes is not supported by the practice in the profession. The fourth point, permitting individual faculty access to the arbitration process, is inconsistent with fundamental union security concepts and is indicative of a schism within the AAUP as to their role as a union or a professional association. The suggestion for arbitration at nonunionized institutions has not met with a large degree of compliance at present. The same may be said for providing the arbitrator with the substance of the record developed through the peer review process. Although the AAUP supports the use of arbitration to resolve certain faculty status disputes, it cautions that arbitration cannot and should not replace the faculty's primary responsibility of peer review and determination of who shall hold faculty appointments.

III. ARBITRABILITY AND THE ROLE OF "ACADEMIC JUDGMENT"

The restraints placed on the scope of what is reviewable in academic arbitration exceed that of virtually any other industry. The major difference between arbitration in the academic and industrial sectors lies in the issue of "academic judgement". Almost every agreement limits on the arbitrator's ability to review academic judgment decisions, although no consensus exists between academic judgment and due process violations. An enigma has developed around the term, with administrators quick to argue that most appointment, retention, promotion and tenure decisions (ARPT), must be classified as academic judgment issues while faculty unionists hold that the same question involves due process violations subject to the arbitration procedure.

Most of the peculiarities and problems associated with academic arbitration are found within this area. Academic judgment may be defined as the routine use of collegial peer review and recommendations to appropriate administrative officials. It has been suggested that "...academic judgment is surrounded by a mystique which has made it unassailable. It is said to be the collective judgment of the College and, therefore of one's peers. One should not question the judgment which is said to be the consensus of one's colleagues."[11]

An entire body of custom and practice has evolved requiring deferral by arbitrators to the sanctity of the academic judgment decision. Unless a review of academic judgment rights is specifically granted to the arbitrator, the arbitrator is constrained to ruling only on procedural issues. The burden of proof is on the grieving party to show that the academic judgment violated the terms of the collective agreement or was done in an arbitrary or capricious manner.

Unless specifically authorized by contract, the arbitrator may not review or even consider the qualifications of a candidate involved in an ARPT grievance. The union, when placed in the difficult position of seeking to reverse a PTC decision, cannot obtain the information sought because the process is confidential. Academic judgment involves matters of academic policy and institutional needs and is not subject to arbitral review.

Listed below are several representative contract clauses pertaining to the academic judgment question.

1) City University of New York

The initial CUNY Agreement, dated September 1969 through August 1972, contained what is believed to have been the first academic judgment clause in any higher education labor agreement.[12] The 1984-1987 Collective Bargaining Agreement Between the Professional Staff Congress and the City University of New York (CUNY) defines academic judgment as:

> the judgment of academic authorities (including faculty,...) (1) as to the procedures, criteria and information to be used in making determinations as to appointment, reappointment, promotions and tenure and (2) as to whether to recommend or grant appointment, reappointment, promotions and tenure to a particular individual on the basis of such procedures, criteria and information. In the arbitration of any grievance of action based in whole or in part upon such academic judgment, the Arbitrator shall not review the merits of the academic judgment or substitute his own judgment therefore, provided that the Arbitrator may determine (i) that the action violates a term of this Agreement, or (ii) that it is not in accordance with the Bylaws or written policies of the Board, or (iii) that the claimed academic judgment in respect of the appointment, reappointment, promotion or tenure of a particular individual in fact constituted an arbitrary or discriminatory application of the Bylaws or written policies of the Board.[13]

2) Portland State University

A distinction is found in the academic judgment clause in the Agreement between Portland State University and the Portland State University Faculty Association. It provides that academic judgment determinations may be reviewed if false information was used in reaching that decision.

> "Academic judgment" shall mean the judgment of faculty and administrators concerning determinations, recommendations, decisions, criteria and information to be used with respect to appointment, reappointment, promotion, tenure status and merit salary increases of members, and with respect to matters of curricula and educational policy. A proved allegation that an academic judgment was based on false information will compel reconsideration of the judgment.[14]

3) Connecticut State University

The Agreement between the Connecticut State University and the AAUP restricts the scope of review by arbitration as follows:

> No individual or group shall substitute its judgment for that of a committee, administration, or the Board in questions of substance or merit in discretionary decisions. This Section shall not apply to grievances processed under Article 15 (Reprimand, Suspension, Termination).[15]

Without specifically referencing academic judgment, the agreement addresses this issue under the category of discretionary decisions.

4) Pennsylvania State College and University System

A bifurcated arbitration procedure is found in the Agreement between the Association of Pennsylvania State College and University Faculties (APSCUF) and the State System of Higher Education. A traditional grievance and arbitration procedure is contained in the agreement however, "decisions involving the non-renewal of probationary non-tenured faculty members ..." are processed in accordance with a separate procedure. This procedure provides:

> Action or inaction by faculty members of the bargaining unit relating to renewals and non-renewals shall not be grievable and shall not bar the President from taking actions which he/she deems to be either appropriate or required.
>
> ....The burden of proof shall be upon the faculty member to show why he/she should be renewed.[16]

This two tier procedure appears only to address non-reappointment issues and is consistent with limits placed on the arbitral review of academic judgment matters.

5) Lake Superior State College

Specific limitations on the arbitrator's authority to hear disputes are contained in the Agreement Between Lake Superior State College and Lake Superior State College Faculty Association, (MEA-NEA). The contract provides that :

> ...The arbitrator is specifically prohibited by this Agreement from hearing any grievance involving the discharge of probationary and temporary faculty members or hearing any grievance concerning the decision not to reappoint or retain a faculty member on supplemental appointment.[17]

By exempting categories of ARPT actions the agreement removes academic judgment issues from the arbitration forum and reinforces the confidentialty and immunity of the peer review process.

6) Wayne State University

A related problem concerning restraints on what is reviewable is the granting and subsequent grieving of "presidential reasons" for unsatisfactory personnel actions. As in academic judgment questions, the

presumption is restrictive; unless language specifically authorizes the granting and/or grieving of "presidential reasons", they are considered to be beyond the scope of the grievance procedure. An exception to this practice of not requiring presidential reasons is found in the Agreement Between Wayne State University and the Wayne State University Chapter of the AAUP. This clause provides that if tenure is not recommended after a favorable recommendation has been transmitted to the president then reasons, if requested by the faculty member, must be given.

> If the President does not recommend for tenure any candidate who received an endorsement for tenure from the college/division committee and/or dean/director, the candidate may request in writing from the President or his/her designee, within fifteen days after written notice, the compelling substantive reason(s) for not endorsing the college recommendations.[18]

Similar language exists with respect to promotion grievances.

Those unfamiliar with the workings of the academic community are often surprised by the lack of substantive rights and protections afforded faculty in ARPT decisions. College presidents are generally not required to give any reasons for nonreappointment or other adverse personnel actions. If reasons are required, the president need not justify these reasons. As one arbitrator well versed in CBHE noted, "...an unusual feature of academic agreements is that they provide so little protection in the area of substantial personnel actions which would at least be reviewable in many other arenas. These actions are appointment, retention, promotion and tenure."[19]

Although academic judgment has enjoyed an exempt status, there are signs, albeit minimal, that its immunity is eroding. Some contractual inroads have been made by faculty contracts giving arbitrators specific contractual authority to review academic judgment questions. This is the surest method of obtaining review.

Review of academic judgment decisions has also occurred in cases where college administrators have used improper or incomplete personnel files to reach their decisions. Procedural errors involving matters of substance (for example, failure to review all submitted materials) may serve as the basis to set a decision and permit further review. When an academic judgment grievance is sustained, however, the remedies are greatly constricted. Arbitrators are usually limited to a remand to correct the procedural deficiency. Often, this involves resubmission of the claim to the same faculty committee which originally deliberated the matter. After reconsideration, they, once again, reach the same decision but this time no procedural violations are noted. Some Agreements provide for remand to select faculty review committees; others presume the status quo for an additional year while the new deliberations are ongoing. In virtually no case may the arbitrator award the ARPT decision sought by the grievant.

IV. REQUIREMENTS OF CONFIDENTIALITY IN THE PEER REVIEW PROCESS

Academic freedom requires the deliberations and proceedings of peer evaluators to be privileged and confidential. The need for anonymity is based on the perception that protection is needed by those conducting reviews and evaluations and that to do otherwise seriously jepordizes the process. The confict between confidentiality and due process persists. Confidentiality is vigorously defended when the issue involves faculty peer review. When personnel decisions are made by college administrators, however, the demand by admininistrators for privilege and confidentiality is challenged by faculty, who argue that due process rights guarantee access to all available information.

This conflict between confidentiality and due process and academic arbitration in an employment relationship built on collegiality, is inherent in the process as long as the vast majority of personnel decisions in academe are conducted in secret sessions. A faculty member involved in an ARPT action needs only to be told the consensus outcome of the decision. Information as to the vote count, how individual faculty members voted, and the reasons for their actions are not revealed. It is a long-standing and widely accepted premise of the academic community that the decisions of the peer evaluators and the PTCs are confidential. The PTC administrative proceedings are presumed free of error and are not subject to arbitral review.

In cases involving allegations of bias, grievants are routinely denied substantive data, thereby limiting them to procedural arguments. If a Title VII Civil Rights violation is alleged, the claimant may go into court and argue the need to breach the confidentiality barrier and demand access to all materials and records used in the deliberative processes. As the review below indicates, decisions involving discrimination cases arising out of unfavorable ARPT actions in the context of the academic freedom/confidentiality issue are voluminous and mixed.

The federal courts have refused to extend the concept of absolute privilege from disclosure to faculty peer evaluators. In re Dinnan,[20] a claim that academic freedom conferred an absolute shield from disclosure of a vote taken by a promotion review commitee. Professor Dinnan was ordered to reveal his vote, refused to and was subsequently found guilty of contempt of court and jailed. In Gray,[21] where a balancing test was applied, the court held that "... absent a statement of reasons, the balance tips towards discovery and away from recognition of privilege." Gray was entitled to discover the vote of the PTC in order to proceed in a civil rights case that he initiated.

The question of disclosure of peer review proceedings to investigative agencies was addressed in two EEOC matters. In EEOC v. University of Notre Dame du Lac,[22] the court upheld the qualified privilege doctrine and allowed EEOC access to certain limited information but shielded the identities of peer evaluators. The qualified adademic privilege doctrine was rejected in Franklin and Marshall,[23] where the court found the investigative powers of the EEOC controlling over the institution's claim of an academic freedom privilege.

Another instance in which due process rights have been extended to individual faculty members is Board of Regents v. Roth,[24] where the U. S. Supreme Court granted a due process hearing to faculty who, as a result of adverse personnel actions, had either been denied an interest in "liberty", or had previously established a "property interest" in their continued employment. Although Roth has not been utilized as a means of gaining reconsideration of unfavorable ARPT arbitration awards, it does move the review process beyond where it had been.

While these cases signal some erosion in the invincibility of academic confidentiality, faculty seeking information to buttress their grievances, absent proof of procedural error, will often be denied. If confidentiality or due process rights have been violated by the employer, it is doubtful that the issue can be successfully raised as a defense for a breach of standards. With a few noted exceptions, the courts do not intervene nor do they reverse arbitration awards. The long-standing practice of deferral to arbitration is widely accepted and noted.[25] Although the vast majority of arbitrators do not conduct independent factual inquiries, those who try to obtain additional information, or who are curious as to why such information has not been introduced into the record, will most certainly be advised of the confidentiality of the process.

SUMMARY AND CONCLUSIONS

Arbitration of faculty status issues remains a viable means of dispute resolution on unionized campuses. The deferral accorded the arbitration system and individual arbitrators by the courts and administrative agencies is well established. A widely accepted "anti-interventionist" policy practiced by the judiciary in terms for reviewing college and university institutional employment practices. Exceptions are noted, most frequently in the field of equal employment.[26]

Opponents of faculty unionization cite academic arbitration as an example wherein collective bargaining is inherently contradictory to peer review and a collegial employment relationship. They ask how can an outside arbitrator evaluate peer review decisions without intruding on the nature of faculty governance.

The effect of arbitral remedy remains unclear, as arbitrators are frequently limited to procedural remands to the very committee that made the decision that gave rise to the grievance. It is hardly a victory for faculty "successful" in their grievance to discover that they must begin the process all over again with the same peer review participants.

A source of conflict continues between those seeking to grieve ARPT decisions and academic traditionalists who hold that academic judgment determinations are not subject to arbitrable review. Contract language suggests that arbitrators have jurisdiction only on procedural grounds. What decisions fall under the cloak of academic judgment and are immune from review is still an open question. As facets of the employment relationship have become more protected, so have the rights of faculty seeking review of unfavorable ARPT decisions. While academic judgment is memorialized in a majority of collective bargaining agreements in higher education as beyond the scope of arbitral review, some erosion of this concept, especially in discrimination claims, may be occurring.

Academic arbitration remains a conservative process with both faculty unionists and college administrators relying, to a large degree, on the procedural models developed in the industrial sector more than fifty years ago.

FOOTNOTES

1. Of the 453 Collective Bargaining Agreements, 69.09 percent (313) are at two-year colleges, and 30.91 percent (140) are at four-year institutions, while 14.3 percent are at private colleges, and 85.7 percent at public institutions. The National Education Association (NEA) represents faculty at 217 institutions, the American Federation of Teachers (AFT) at 130 and the American Association of University Professors (AAUP) at 41. Independent unions and joint affiliations account for the rest. For a statistical analysis of faculty collective bargaining, see Douglas and Cohen, Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education, v. 15 (New York: Baruch College, 1989).

2. Private sector faculty collective bargaining is regulated and conducted pursuant to the National Labor Relations Act, P.L. 198, 74th Congress (1935), as amended.

3. The data with respect to contract clause analysis was originally compiled in conjunction with the Labour Agreements Data Bank of McGill University. See Douglas, An Analysis of The Arbitration Clause in Collective Bargaining Agreements in Higher Education, 39 Arb. J. 38 (1984).

4. Nonunionized institutions with faculty grievance and arbitration procedures include Columbia, Cornell and Northeastern Universities. No data are available as to the total number of schools that fall into this category. The increased use of arbitration in other nonunionized industries is

expected to spillover into higher education for both faculty and support staff personnel.

5. For further reading on the relationship between college governance and collective bargaining, see Lee, Contractually-Protected Senates at Four-Year Colleges in The Legal and Economic Status of Collective Bargaining in Higher Education, ed. Joel M. Douglas (New York: Baruch College, 1981), 56; Kemerer and Baldridge, Senates and Unions: Unexpected Peaceful Coexistence, 52 J. of Higher Educ. 256 (1987); Douglas, The Impact of Collective Bargaining on Governance, PERS Information Bull. (Jan.-Feb. 1979).

6. Weisberger, Faculty Grievance Arbitration in Higher Education: Living with Collective Bargaining, IPA Monograph No. 5 (Ithaca, NY: Cornell University, 1976), 3.

7. See NLRB v. Yeshiva University, 444 U.S. 672, 103 LRRM 2526 (1980) for an analysis of the managerial status of college faculty.

8. American Association of University Professors (AAUP), Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments; Statement on Procedural Standards in Faculty Dismissal Proceedings (1958), in AAUP Policy Documents and Reports (Washington: AAUP, 1984), 3, 10.

9. AAUP, Arbitration in Cases of Dismissal, in AAUP Policy Documents and Reports, supra note 9, 67.

10. Id. at 68.

11. Wolf, "The Gray Areas Between Due Process and Academic Judgment," in Campus Bargaining in the Eighties: A Retrospective and Prospective Look, Proceedings of the Eighth Annual Conference of the National Center for the Study of Collective Bargaining in Higher Education, ed. Aaron Levenstein (New York: Baruch College, 1980) 131.

12. For a perspective of the CUNY experience with academic judgment and the issue of reasons, see Bernard Mintz et al., "In the Defense of Academic Judgment: Settling Faculty Collective Bargaining Through Arbitration." Buffalo Law Review 22 (Winter 1973): 523-544.

13. Collective Bargaining Agreement between the City University of New York and the Professional Staff Congress, 1984-1987, Article 20. Complaint, Grievance and Arbitration Procedure, Sec. 20.5, Special Arbitration Procedures, (b), p. 36.

14. Collective Bargaining Agreement between Portland State University and the AFT, 1985-1987, Article 10, Sec. 3(b), Grievances, p. 8.

15. Collective Bargaining Agreement between Connecticut State University System and the AAUP, 1984-1987, Article 14, Grievance Procedure, Sec. 14.6.2, Remedy, p. 56.

16. Collective Bargaining Agreement between Pennsylvania State System of Higher Education and APSCUF, 1985-1987, Article XIV, Renewals and Non-Renewals, Sec. 8-9, p. 22.

17. Collective Bargaining Agreement Between Lake Superior State College and MEA/NEA, 1986-1988, Article 12, Grievance Procedure, Sec. 12.2.4.3, p. 28.

18. Collective Bargaining Agreement Between Wayne State University and the AAUP, 1986-1988, Article XXII, Tenure Procedures, D., 3, p. 68.

19. Benewitz, Arbitration in Higher Education: Is Academic Arbitration "Sui Generis"?, in The Legal and Economic Status of Collective Bargaining in Higher Education, supra, note 5, 63.

20. In re Dinnan: Blaubergs v. Board of Regents of the University System of Georgia, 661 F.2d 426, 430 (11th Cir. 1981); cert.den. sub nom. Dinnan v. Blaubergs, 457 U.S. 1106, 50 U.S.L.W. 3962 (1982).

21. S. Simpson Gray v. Board of Higher Education of the City of New York, 692 F.2d 901, 30 FEP Cases 297 (2d Cir. 1982).

22. EEOC v. University of Notre Dame du Lac, 715 F.2d 31 (7th Cir. 1983).

23. EEOC v. Franklin and Marshall College, 775 F.2d 110, 39 FEP Cases 211 (3d Cir. 1985), cert.den., 106 S.Ct.2288, 40 FEP Cases 1617 (1986).

24. See Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972) for an analysis of an individual's "property interest" and "liberty" within a university framework. See also Cleveland Board of Education v. Loudermill, 470 U.S. 532, 118 LRRM 3041 (1985), where the U.S. Supreme Court held that public employees must receive all procedural rights to which they are entitled including, if applicable, a predetermination hearing.

25. A contrary view was set forth in Ruth F. Dixon v. Rutgers, 215 N.J. Super. 333, 521 A. 2d 1315 (1988). The New Jersey Superior Court, affirming the judgment of the appellate division, held that the collective bargaining agreement between Rutgers and the AAUP "does not preclude discovery of peer review materials." Professor Dixon had appealed an adverse tenure and promotion decision, arguing that she was entitled to discovery of confidential letters from outside evaluators. The university claimed that an academic freedom privilege existed and that they should not be required to disclose these external confidential letters.

26. See Alexander v. Gardner-Denver, 415 U.S. 36 (1974), in which the U.S. Supreme Court held that the Title VII rights of an employee may not be limited even after an adverse arbitration award.